Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier	)	CC Docket No. 01-92
Compensation Regime	)	

COMMENTS OF THE
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

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Table of Contents

Page Number

Summary

The Personal Communications Industry Association ("PCIA") is commenting on the *Notice of Proposed Rulemaking* in which the Commission is re-examing the intercarrier compensation regime and exploring whether a unified bill-and-keep regime will serve the public interest.

Bill-and-keep makes sense for two-way commercial mobile radio service ("CMRS") interconnection with local exchange carriers ("LECs") because the obligations being offset in both directions are mutual and substantial. In the case of one-way paging, however, a bill-and-keep standard would not meet the statutory requirement for a mutual recovery of costs through the offsetting of reciprocal obligations. Consequently, in the case of paging, bill-and-keep should be permissive, not mandatory.

Mandatory bill-and-keep for paging would disrupt existing LEC-paging interconnection arrangements which have just recently become settled, reward LECs for the intransigence they showed in meeting the current requirements for paging interconnection, disrupt current network configurations and leave paging carriers with no practical means of recouping costs. This would be a step backward to the days when LECs were allowed to use their bottleneck control of essential local telephone facilities to extract monopoly profits.

Instead of abandoning the current interconnection regime for paging carriers, the Commission should adopt changes that will improve it. Specifically: (1) the Commission should reiterate the requirement that LECs must provide dedicated transport based on the LEC's forward-looking economic costs; (2) transit traffic carriers should be obligated to look to the originating carrier, not the terminating carrier, for payment; and, (3) a default rate for paging

carrier terminating compensation should be established at the ILEC's termination rate based upon the number of cost studies endorsed by State Commissions and voluntary agreements that establish symmetrical rates.

Most important, the Commission should adopt uniform national LEC-CMRS interconnection rules, and accord CMRS carriers the option of enforcing their interconnection rights at the federal level, rather than requiring them to negotiate/arbitrate agreements in every state. The Commission has the authority under Section 332 of the Act to implement this important change.

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The Personal Communications Industry Association ("PCIA")[1] is commenting on the *Notice of Proposed Rulemaking* ("*Notice*") adopted by the Federal Communications Commission (the "FCC" or "Commission") on April 19, 2001 in the above-captioned proceeding.[2] The *Notice* undertakes a fundamental re-examination of intercarrier compensation and explores the prospect of adopting a unified bill-and-keep regime for both access charges and local interconnection. In addition, the *Notice* explores possible modifications to the existing intercarrier compensation regime to resolve specified problems that have been identified.[3]

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[1] PCIA is a wireless communications association dedicated to advancing seamless global communications through its strategic marketing, public policy expertise, events and educational programs. PCIA members include a broad base of interdependent mobile convergence players. PCIA is devoted to the rapid, efficient, and cost effective deployment of consumer-driven mobile products and services around the world. PCIA's membership alliances include the Paging and Messaging Alliance, the Personal Communications Service Alliance, the Mobile Wireless Communications Alliance, the Private System Users Alliance, and the Site Owners and Managers Alliance. PCIA's Frequency Coordination and Microwave Clearinghouse divisions give it unique expertise in spectrum management services and have made it an industry leader in representing and serving the interests of tens of thousands of FCC licensees.

[2] *Developing a Unified Intercarrier Compensation Regime*, FCC 01-132 (Released April 27, 2001), 66 Fed. Reg. 28,410 (2001).

[3] *Notice* at ¶¶ 98-120.

PCIA applauds the Commission's efforts to re-examine intercarrier compensation in order to ensure that the current regime promotes the pro-competitive objectives of the Telecommunication Act of 1996.[4] Having closely examined the issues raised in the *Notice* as they relate to paging carriers, PCIA concludes that the Commission should *not* fundamentally alter the existing LEC/paging intercarrier compensation regime, but rather should reaffirm and improve certain rules governing the LEC/paging carrier interconnection relationship. Further, PCIA submits that the Commission should establish nationwide uniform LEC-CMRS interconnection rules pursuant to Sections 201 and 332 of the Communication Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"), and consistent with the substantive protections given by Sections 251 and 252 of the Act. The following is respectfully shown:

I. Introduction

PCIA has a wealth of experience with the existing intercarrier compensation regime which gives it an informed basis to comment on the proposals advanced by the Commission in the *Notice*. PCIA has been an active participant in interconnection dockets for many years and participated extensively in the proceedings that led to the landmark *Local Competition Order*.[5] PCIA was a party to the appeal of the *Local Competition Order* that resulted in the Eighth Circuit upholding the *Local Competition Order* rules with respect to CMRS carriers.[6] In addition, PCIA has participated actively in many of the subsequent clarifications and appeals

[4] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act").

[5] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd 15499 ("*Local Competition Order*"), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. V. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded*, *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

regarding the *Local Competition Order* as applied to paging and messaging carriers, including the *Keeney Letter*[7] and the *Metzger Letter*.[8] Further, PCIA has intervened and filed briefs in numerous state proceedings pertaining to interconnection issues.

PCIA's members also have participated extensively in federal and state-level interconnection matters, including the *Cook v. Pacific Bell* arbitration and subsequent appeal,[9] *AirTouch Paging v. Pacific Bell*,[10] and the *TSR Order*.[11] PCIA's members have negotiated voluntary agreements and, when necessary, pursued arbitration with all the major ILECS under the rules promulgated in the *Local Competition Order*. Many of the resulting interconnection agreements currently are in the process of being renewed. Accordingly, PCIA and its members have extensive knowledge and a wealth of experience in interconnection matters and therefore have an informed basis on which to offer comments to the Commission in this proceeding.

II. THE COMMISSION SHOULD NOT MANDATE BILL-AND-KEEP FOR LEC-PAGING INTERCONNECTION, BUT RATHER SHOULD PROVIDE IT AS ANOTHER OPTION

In the *Notice*, the Commission asks whether it should replace the existing intercarrier compensation regime which is founded on the principle that the calling party's network pays ("CPNP") the terminating carrier for the additional costs incurred by the terminating carrier for

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6 *Iowa Utils. Bd v. FCC*, 120 F.3d 753, n. 21 (8th Cir. 1997) ("*Iowa Utils. Bd*").

7 Letter from Common Carrier Bureau Chief Regina Keeney to Cathleen Massey, *et al*., dated March 3, 1997 (the "*Keeney Letter*")

8 Letter from Common Carrier Bureau Chief A. Richard Metzger, Jr. to Keith Davis, et at., DA 97-2726, CCB/CPD No. 97-24, released December 30, 1997, 13 FCC Rcd 184, 185 (1997) (the "*Metzger Letter*").

9 *Cook Telecom v. Pacific Bell*, 197 F.3d 1236 (9th Cir. 1999).

10 *AirTouch Paging of California v. Pacific Bell*, 1999 U.S. Dist. LEXIS 16615 (N.D. Cal. 1999) ("*AirTouch Paging v. Pacific Bell*").

11 *TSR Wireless v. US WEST Communications, Inc*., 15 FCC Rcd 11166, 2000 WL 796703 (the "*TSR Order*") , *aff'd sub nom*., *US WEST Communications, Inc. v. Federal Communications Commission* No. 00-1376, 2001 U.S. App. LEXIS 13389 (June 15, 2001), p*etition for rehearing en banc pending* ("*TSR Appeal*").

transport and termination of calls originated by the calling party's network. The suggested alternative is a mandatory bill-and-keep regime where each carrier involved in a call would recoup from its own customers the costs associated with transport and termination of each call. PCIA submits that a mandatory bill-and-keep regime is permissible under the Act <u>only</u> when there is a substantial mutuality of obligation between the parties for payment of reciprocal compensation. While this condition is met for two-way CMRS, such a mandatory bill-and-keep regime would not serve the public interest for LEC-paging interconnection since one-way paging carriers do not have a substantial mutuality of obligation for payment of reciprocal compensation. Consequently, bill-and-keep, if implemented for other CMRS, should only be an option, rather than mandatory, for paging carriers.

A. Mandatory Bill-and-Keep is Permissible Under the Act Only When There is Substantial Mutuality of Obligation for Payment of Reciprocal Compensation

Under Section 251(b)(5), all CMRS carriers, including paging carriers, are entitled to reciprocal compensation to recover their additional costs for the transport and termination of telecommunications. In the *Local Competition Order*, the Commission expressly found that "all CMRS providers provide telecommunications and that LECs are obligated pursuant to Section 251(b)(5) (and the corresponding pricing standards of Section 252(d)(2)) to enter into reciprocal compensation arrangements with all CMRS providers, <u>including paging providers</u> for the transport and termination of traffic" on the CMRS providers network.[12] The Commission also found that "carrier[s] incur costs in terminating traffic that are not *de minimus*."[13] The conclusions in the *Local Competition Order* that paging carriers incur additional costs and are

[12] *Local Competition Order* at ¶1008 (Emphasis Added).

[13] *Local Competition* Order at ¶ 1112.

entitled to reciprocal compensation under Section 251(b)(5) continue to be valid today. Paging carriers still provide telecommunications as defined by the Act and do incur additional costs to transport and terminate calls originated by LECs. Accordingly, there is no reasoned view of Sections 251/252 that would deprive paging carriers of termination compensation in these circumstances.

The *Notice* asks whether the Commission should revisit its earlier determination of when a mandatory bill-and-keep compensation regime can be deemed a "reciprocal" arrangement under Section 251/252 and 332.[14] The answer is that the Commission should supplement its earlier analysis, not supplant it. In the *Local Competition Order*, the Commission correctly found that Section 251(b)(5) requires all LECs to establish reciprocal compensation arrangements with all CMRS carriers for the transport and termination of telecommunications.[15] Further, the Commission concluded that a state commission may impose bill-and-keep arrangements only if "neither carrier has rebutted the presumption of symmetrical rates and if the volume of terminating traffic that originates on one network and terminates on another network is approximately equal to the volume of terminating traffic flowing in the opposite direction and is expected to remain so."[16] The Commission went on to conclude that bill-and-keep would be justified when traffic is "roughly balanced" in each direction and the state commissions were encouraged to adopt specific thresholds of when traffic was "roughly balanced".[17] In

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[14] *Notice* at ¶¶ 78-96.

[15] *Local Competition Order* at ¶1045. Of course, carriers are free to engage in bill-and-keep in voluntary agreements under Section 252(a)(1). The focus of these comments is on whether the Commission may impose mandatory bill-and-keep and, if so, what segments of the telecommunications industry would benefit in the public interest by such a change.

[16] *Local Competition Order* at ¶1111 (Emphasis Added).

[17] *Local Competition Order* at ¶1113.

determining when traffic is "roughly balanced" the Commission found that "precise traffic measurement is not necessary".[18] Finally, the Commission rejected a flat across the board bill-and-keep arrangement for all LEC-CMRS traffic because there had been no finding that (a) the transaction costs to measure terminating traffic were so high as to make bill-and-keep more efficient, and (b) that the aggregate cost flows would be in balance.[19]

Upon further consideration, PCIA now believes that the *Local Competition Order*'s interpretation is unduly narrow of when bill-and-keep arrangements are permitted under the Act. In construing what forms of reciprocal compensation arrangements pass statutory muster, Section 252(d)(2)(B)(i) allows the Commission to establish reciprocal compensation arrangements that provide for the "mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep)" of costs. The statute does not require that the aggregate cost flows (or traffic) be roughly balanced, or that the transaction costs be high; rather the test under the statutory section is whether the obligations being offset are reciprocal and the costs saved are substantial, not nugatory. As the Commission properly observed in the *Local Competition Order*, Sections 252(d)(2) and 251(b)(5) do not require equality of obligation with mathematical precision, merely that the obligations being offset are mutual and substantial.[20]

When the reciprocal obligations being offset are mutual and substantial, such as is the case in LEC-LEC, LEC-cellular and LEC-PCS interconnection, bill-and-keep makes sense. Each carrier is offsetting a substantial amount of its costs to terminate calls originating on the other

[18] *Id.* at ¶1114.

[19] *Local Competition Order* at ¶1117.

[20] *Id.* at ¶1114.

carrier's network, against foregone termination payments to the other carrier for traffic originated by it.[21] However, when a terminating carrier is unable to offset its additional costs to terminate calls through substantial savings of avoided terminating compensation payments, Section 252(d)(2)(B)(i) precludes mandatory bill-and-keep.[22]

Nothing has changed with respect to LEC-paging interconnection that would support a complete reversal of the Commission's previous determination that bill-and-keep is not appropriate under Sections 251/252 and 332 for LEC-paging interconnection. Paging carriers continue to offer substantially the same services they did when the *Local Competition Order* was released; thus their aggregate cost flows have remained the same.[23] Further, under the proper reading of Section 251(b)(5) and 252(d)(2) set forth above, mandatory bill-and-keep for LEC-paging interconnection would not be justified. Paging carriers do not enjoy substantial offsetting savings under bill-and-keep because one-way paging carriers terminate calls on their carrier's

[21] In addition, even under the narrower standard previously articulated by the Commission, cellular and PCS carriers would be entitled to bill-and-keep because the aggregate cost flows have become sufficiently balanced and, accordingly, the transaction costs to measure and bill terminating compensation are quickly becoming overtaken by the amount of compensation that would be paid.

[22] PCIA views the responsibilities as nugatory when a carrier has little or no savings incurred as a result of a bill-and-keep arrangement. For example, a two-way wireless carrier clearly has substantial savings if its does not have to pay the terminating carrier the additional costs to transport and terminate its calls, and the two-way wireless carrier will incur substantial costs in transporting and terminating the calls of other carriers. In this example, two-way carriers realize both substantial savings and incur substantial costs. The fact that these costs are not in precise balance does not mean that two-way carriers should not be entitled to bill-and-keep arrangements. With one-way paging, however, paging carriers incur costs and do not realize any savings through bill-and-keep. Accordingly, any benefits paging would enjoy under bill-and-keep would be nugatory.

[23] Although some paging carriers have begun offering advanced paging services, in the *Sixth Report* on CMRS Competition, the Commission indicates that there continue to be in excess of 45 million one-way paging subscribers in the United States. Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Sixth Report*, FCC 01-192 (released July 17, 2001) at p. 53. Further, the Commission indicates that there are currently approximately 1 million two-way messaging subscribers. Although two-way messaging subscriber units are growing, the existing one-way paging services market will continue to have a substantial number of units in service for the long-term. Indeed, many regional paging companies continue to provide almost exclusively one-way paging services. Advanced messaging services include wireless data services, such as two-way messaging and 1.5 way guaranteed messaging. *Id.* To the extent that these advanced paging services entail two-way communications, but will not result in the substantial amount of compensation for the transport and termination of traffic originated on the

networks and do not originate calls. Mandating bill-and-keep for paging carriers would accordingly run afoul of Sections 252(d)(2)(A)(ii) and Section 252(d)(2)(B)(i).

The *Notice* also asks whether the statutory scheme of Sections 251 and 252 allows a terminating carrier to be forced to recover its added costs from its own end users.[24] Substituting a regime where carriers recover their costs from their own end users instead of from either the originating carrier or the offsetting of reciprocal obligations is difficult to reconcile with the language of Section 251(b)(5)[25]. This provision appears to require that the terminating carrier recover its costs either through the offsetting of reciprocal obligations or through payments from the originating carrier for the additional costs of terminating calls, rather than from the terminating carrier's own customers. Section 251(b)(5) provides that each local exchange carrier shall "establish reciprocal compensation arrangements for the transport and termination of traffic." Furthermore, Section 252(d)(2) provides that the terms for reciprocal compensation shall not be considered just and reasonable unless the terms and conditions "provide for the mutual and reciprocal recovery of each carrier of costs associated with the transport and termination on each carrier's network facilities that originate on the network facilities of the other carrier." Finally, while Section 252(d)(2)(B)(i) does not preclude bill-and-keep, this is only the case when justified by the offsetting of reciprocal obligations. These statutory sections, read together, clearly contemplate that recovery for costs must either be through the offsetting of

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paging carrier's network which would justify mandatory bill-and-keep.

[24] *Notice* at ¶ 76.

[25] Of course, to the extent that carriers are not required under Section 251(b)(5) to establish reciprocal compensation arrangements, such as CMRS-CMRS interconnection arrangements, the carriers are free to recover their costs in any manner acceptable to both carriers, including recovering their costs from their own end users. Furthermore, to the extent that carriers voluntarily enter into interconnection arrangements, they are free to disregard Sections 251(b) and (c) and to implement bill-and-keep where each carrier recovers its costs directly from its own end users. *See* Section 252(a)(1).

substantial reciprocal obligations or reciprocal payments *between carriers*. The recovery by a carrier of costs from its own end users is not the subject of the statutory scheme and cannot substitute for it.[26]

Section 332 and other statutory provisions [27] clearly empower the Commission to make rules of “special interest to CMRS carriers”.[28] However, Section 332 should be read to permit the recovery by paging carriers of their additional costs to transport and terminate traffic, consistent with Sections 251/252 of the Act.[29] While the Commission has the authority to implement rules with respect to LEC-CMRS interconnection that are different than those applicable to LEC-CLEC interconnection, the Commission should strive to the extent possible, for a coherent reading of the interconnection obligations in the Act that serves to reconcile the obligations under Section 332 with other obligations, including the obligations under Section 251(b)(5) for the payment of reciprocal compensation and the interpretive provisions of Section 252(d). Variances should be implemented only to the extent necessary to accommodate unique aspects of CMRS. For example, the Commission certainly was justified in adopting the rule that all CMRS telecommunications originating and terminating within an MTA are “local” and therefore within the ambit of Section 251(b)(5). This special rule is justified by the special circumstance that CMRS services are largely exempt from state regulation and thus operate without regard to traditional local calling area boundaries.

[26] That is not to say that CMRS carriers are restrained in how they design their rate structures. CMRS carriers are permitted under the Act to design their rates in any reasonable way so long as they are just and reasonable. CMRS carriers may decide to recover all of the costs associated with providing their service in any way, including from their end users.

[27] In *MTS and WATS Market Structure*, 55 RR 2d 785 n.5 (1984) the Commission observed that, “The FCC has plenary authority over carrier-to-carrier interconnection under Section 201(a) of the Act.”

[28] *See Iowa Utils. Bd* at fn 21.

There is, however, no similar distinguishing feature of CMRS that would justify depriving paging carriers of the right to receive terminating compensation to defray the costs associated with transport and termination of another carrier's traffic. The Commission, should not, therefore, under Section 332 mandate bill-and-keep for paging where it would prevent a recovery of the paging carrier's additional costs for transport and termination as contemplated under Section 251(b)(5).

B. Mandating Bill-and-Keep For LEC-Paging Interconnection Would Not Serve the Public Interest

Adopting a mandatory bill-and-keep intercarrier compensation regime for LEC-paging interconnection will not serve the public interest for several reasons:

1. Mandatory bill-and-keep for LEC-paging interconnection will lead to a substantial and impermissible shifting of costs from the LECs to paging carriers

Under bill-and-keep, paging carriers would be required to recover their additional costs to terminate LEC-originated traffic from their own end users which, given the current state of the paging market, they are unlikely to be able to do.[30] Further, since the originating carrier has no obligation under a bill-and-keep regime to reimburse transport costs, the LECs are incented to shift all transport costs and obligations onto the paging carrier and/or the paging carrier's end

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[29] *Iowa Utils Bd.* at fn 21 and 39.

[30] As the cost of two-way service has declined, and paging functionalities have been added to two-way handsets, an increasing number of wireless customers are abandoning one-way service for two-way. This is one reason that a number of paging carriers are facing severe financial challenges. Under these market conditions, it is impractical to expect paging carriers to be able to increase end user prices. *See* discussion *infra* at p. 14.

users. This is a serious concern in the context of ILEC-paging interconnection since the ILEC continues to wield dominant market power and paging carriers have no choice but to interconnect with ILECs in order to have local access to the public switched network.

The shifting of LEC transport costs to paging carriers will occur through LEC restrictions on how and where paging carriers may interconnect. This is not a new tactic. LECs have long recognized the tactical benefit of shifting transport costs to paging carriers because the unidirectionality of traffic shields them from any "reciprocal" obligations. It is only by virtue of the protections accorded in Section 51.703(b) -- which have been properly interpreted by the Commission to obligate LECs to pay for the facilities used to deliver their traffic to paging carriers - - that any fairness has been achieved in allocating the costs of facilities. If bill-and-keep is implemented for LEC-paging interconnection, the LECs would again use their dominant market power to force paging carriers into uneconomic interconnection arrangements where paging carriers would pay all costs of interconnection and transport. This would be an unfortunate step backwards. Historically, the ILECs required all CMRS carriers to interconnect in local calling areas of the ILEC and to pay all costs associated with transporting and terminating ILEC originated traffic from the originating serving wire center to the CMRS switch. The Commission previously found in the *Local Competition Order* that "section 251(b)(5) prohibits charges such as those some incumbent LECs currently impose on CMRS providers for LEC-originated traffic."[31] To allow the LECs to recreate the regime of charges previously found to be prohibited would return paging carriers to the unfair position they were in prior to the passage of the Telecommunications Act of 1996. This would not serve the public interest.

[31] *Local Competition Order* at ¶ 1042. The Commission observes in the *Notice* that the current rules preclude ILECs from charging carriers for local traffic that originates on the ILEC network. *Notice* at ¶ 112 and fn. 180.

2. Mandating bill-and-keep for LEC-Paging interconnection would disrupt the paging industry and reward the ILECs for their intransigence

Paging carriers have only recently begun enjoying the pro-competitive effects of the 1996 Act. While the ILECs promptly entered into post-1996 Act interconnection agreements with other telecommunication carriers, including CMRS carriers, many ILECs refused until recently even to agree that paging carriers are entitled to the benefits of the Act,[32] let alone to enter into any agreements that reflected paging carriers' rights under the 1996 Act. It is only through perseverance and consistent rulings from the FCC that progress has been made.[33]

Now that paging carriers finally have been able to secure going forward agreements with the largest ILECs that provide for the recovery of some of the additional costs associated with transport and termination of LEC-originated calls, paging carriers are in the midst of re-engineering their networks and interconnection arrangements to implement these new interconnection agreements.[34] It will take considerable time for these new arrangements to be implemented and for the paging carriers to recoup the costs of negotiating new interconnection agreements and re-engineering their networks.[35] Changing the rules now would be very disruptive because the paging industry will not have yet completed the implementation before

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[32] *See TSR Order*, *Cook v. Pacific Bell*, *AirTouch Paging v. Pacific Bell*, *BellSouth Corporation v. AirTouch Paging*, Civ. Act. No. 98-CV-0293-JOF(N.D.Ga.) and *AirTouch Paging v. US WEST Communications*, Civ. Act. No. 99-WM-12 (Colo. Dist Ct). Indeed, as recently as this year, the ILECs continued to argue in the *TSR Appeal* that paging carriers are not entitled to the benefits of the Act.

[33] *See TSR Order*, and precedents cited therein.

[34] For example, many LEC-paging interconnection agreements place restrictions on the retention or implementation of new Type 1 (end-office level) interconnections and as a consequence paging carriers are in the midst of converting to Type 2 (tandem level) interconnection.

[35] The costs associated with negotiating these new interconnection agreements were substantial. In many instances, substantial effort was required to force the ILECs to recognize their responsibilities under the Act and in many instances litigation was required to force an interconnection agreement that comported with the Act.

being forced to shift gears once again – with the prospect of another delay of many years to get new agreements in place.

Further, since the ILECs unreasonably delayed recognizing paging carriers' interconnection rights,[36] moving to bill-and-keep would reward the ILECs for their intransigence. In many instances, the ILECs not only refused to acknowledge their responsibilities, but they engaged in repeated attempts to delay any implementation of the rules as they applied to paging carriers. For instance, although the Commission clearly stated in the *Metzger Letter* that ILECs were prohibited from charging for the facilities used to deliver their traffic to paging carriers, some ILECs, such as Qwest, argued that the *Metzger Letter* was not the policy of the Commission and asked state commissions and courts to disregard it. Further, even after the Commission released the *TSR Order*, some ILECs continued to urge courts to disregard it. With this history in mind, if bill-and-keep is adopted for LEC-paging interconnection, the Commission is certain to see a replay of the last several years with major disputes erupting between the ILECs and the paging carriers on the exact obligations of each party under the new Commission Rules. This obviously would not serve the public interest.

3. Mandating bill-and-keep for paging carriers would be discriminatory and not technology neutral

Imposition of mandatory bill-and-keep for LEC-paging interconnection would not be technology neutral because of the peculiarly harsh effect it would have on carriers authorized only to provide one-way services. Since paging carriers do not originate traffic and thus pay no terminating compensation to LECs under the current scheme, they have no savings under a bill-

[36] The *TSR Order* expressly found the LEC's defense of their position on paging interconnection to be "nonsensical" and admonished the LECs because the prior FCC rulings were clear and the LEC's "should not have doubted their obligation to cease charging". *TSR Order*, paras. 25, 29.

and-keep plan to defray the additional costs of transporting and terminating LEC-originated traffic. And as earlier noted, paging carriers are in no position to raise end-user rates to cover these costs which are required by the Act to be paid by the originating party. As the Commission has observed on numerous occasions, the market for paging services is highly competitive.[37] As the *Sixth Report* observes, there are "an average of 28 paging licenses serving each of the 25 largest cities in the United States (not including resellers) and an average of 10 paging licenses serving each of the 25 smallest MSAs."[38] Paging services also face substantial competition from other CMRS services, such as enhanced SMR services, broadband PCS and cellular.[39] As a consequence, even if recovery from end-users was a permissible form of reciprocal compensation under the Act, which it is not, the necessary rate hikes would be virtually impossible for paging carriers to implement.[40] Substitute CMRS services, such as enhanced SMR, broadband PCS and cellular, however, would be able to compete without rate increases because they would recover in the aggregate their additional costs through cost savings for the traffic they originate. The result would be further competitive disadvantage solely because of the technological nature of paging.

Paging services also generally are billed on a flat monthly fee basis, rather than on a usage sensitive basis. Forcing paging carriers to recoup what will be variable interconnection

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[37] *Sixth Report* at p. 56.

[38] *Id.* PCIA recognizes that in some instances multiple licenses are held by a single carrier. Nevertheless, it remains the case that all areas of the country enjoy robust competition among and between many paging carriers.

[39] *Sixth Report* at p. 56.

[40] *Id.* at p. 53-54. Such a result may also constitute an impermissible regulatory action because paging carriers would in effect be precluded from recovering their costs of interconnection. The Commission has previously found that bill-and-keep would be appropriate and not be an impermissible regulatory action if each party received an offsetting benefit in reduced costs of termination. *See Local Competition Order* at ¶1116. Here since paging carriers would not receive such an offsetting benefit, mandatory bill-and-keep may constitute an impermissible regulatory action.

costs from their own customers could mandate the implementation of costly usage sensitive billing systems. Again, this would place an undue burden on paging carriers. Accordingly, mandatory bill-and-keep would not be technology neutral as required by the Act and consistent Commission policy over the years.

4. Regulatory arbitrage does not exist in LEC-paging interconnection

Mandatory bill-and-keep is not required to eliminate regulatory arbitrage in the paging arena even if arbitrage is a concern in other sectors of the telecommunications business.[41] There is absolutely no evidence that paging carriers have engaged in the types of regulatory arbitrage identified by the Commission with respect to ISP-bound traffic.[42] Indeed, in the period of time since the passage of the 1996 Act, the number of providers of paging service has been declining, not increasing, which dispels any notion that paging interconnection compensation presents a real arbitrage opportunity.[43] Nor is it likely that continuing the existing regime will result in regulatory arbitrage even if the Commission adopts mandatory bill-and-keep for other segments of the telecommunication industry.

Paging carriers provide one-way services not as an arbitrage play but rather because one-way services are the only services they are authorized to provide under the terms of their licenses. In addition, paging terminating compensation would only be available to carriers that are licensed as paging carriers, and only for the markets in which they hold paging

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[41] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket No. 96-98); *Intercarrier Compensation for ISP-Bound Traffic* (CC Docket No. 99-68, FCC 01-131 (released April 27, 2001) ("*ISP-Remand Order*"); *See also Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*; (CC Docket No. 96-262), FCC 01-146, (released April 27, 2001).

[42] *See ISP Remand Order* at ¶67-76.

[43] This decrease has occurred in part through consolidation but also because there has been a real decline in the number of paging-only subscribers. Certainly this decline prevents any finding that the current regime is unduly

authorizations. Since paging licenses have significant build-out and operating requirements, non-paging carriers would not become paging carriers merely to receive the terminating compensation paid to paging carriers.

Unlike the situation faced by the Commission in the ISP-bound traffic context - - where per minute compensation exceeded per minute costs - - it is unlikely that any carrier would become a paging carrier merely to receive terminating compensation. This is especially true since the ILEC may limit any terminating compensation to the actual proven forward-looking costs incurred by the paging carrier. These forward-looking costs are likely to be less than actual costs incurred by the carrier to provide service which clearly dampens any arbitrage opportunities. In contrast to ISP-bound traffic - - which generates calls typically longer than the average wireline call length, and which therefore generates compensation revenues in excess of actual per MOU costs - - paging calls are shorter in duration (often less than 20 seconds per call) than average wireline call length. Thus, unlike the situation in ISP-bound traffic where the length of the calls made the terminating rates attractive, the rates for terminating paging calls clearly fit within the assumptions used to generate the ILEC rates. Finally, in most cases the terminating compensation being paid to paging carriers is equal to or less than the same rates paid by LECs to other LECs or CMRS carriers. Therefore, there is no arbitrage opportunity if the Commission continues the existing intercarrier regime for LEC-paging interconnection.

5. A unified intercarrier compensation regime is not required by the public interest

The *Notice* seeks comment on whether the Commission should adopt a unified intercarrier compensation regime for all telecommunications traffic and whether such a unified

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favorable to paging service providers and encourages arbitrage.

regime would serve the public interest.[44] PCIA submits that, if the Commission adopts mandatory bill-and-keep for all other telecommunications traffic, it need not and should not adopt the same unified intercarrier compensation regime for LEC-paging interconnection. As shown above, adoption of mandatory bill-and-keep for LEC-Paging interconnection would result in unfair competitive disadvantages for paging carriers. This being the case, a unified compensation scheme is not required. The FCC has for years operated with different intercarrier compensation schemes.[45] In this period, consumer choices have increased and consumer prices have dropped. There is, therefore, no inherent disadvantage to maintaining separate schemes provided that each is well thought out. Accordingly, the Commission need not adopt mandatory bill-and-keep for LEC-paging interconnection even if it does so for all other carriers.

C. Any Adoption of Bill-and-Keep For LEC-Paging Interconnection Should Be On A Voluntary Basis

Rather than adopting a "one-size fits all" approach to intercarrier compensation, the Commission should adopt bill-and-keep as another option for paging carriers to use in reaching interconnection arrangements with LECs. Currently the Commission gives CMRS carriers the choice of "opting into" lower termination compensation arrangements under the "mirroring" rule set forth in the *ISP-Remand Order* or staying with their current CPNP agreements.[46] A similar "opt-in" rule should be adopted to allow paging carriers to choose a bill-and-keep option in any circumstance where another CMRS carrier has such an arrangement.

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[44] *Notice* at ¶ 4.

[45] For example, much LEC-to-LEC interconnection is on a bill-and-keep basis, while LEC-CMRS compensation reflects a calling party's network pays approach and pay phone compensation is a called party pays regime.

[46] *ISP Remand Order* at ¶¶ 89-94.

An "opt-in" rule would allow a paging carrier the option of choosing the best interconnection arrangement for its network – be it bill-and-keep or CPNP. Since each carrier has different network configurations and interconnection arrangements, a one-size-fits-all approach inevitably will lead to some carriers being benefited by such an approach while others are harmed by it. Indeed, as discussed above, if the Commission adopted the same intercarrier regime for all CMRS traffic, paging carriers would be disadvantaged. This would result in a regulatory skewing of the marketplace. The Commission's regulations, not the marketplace, would end up choosing the winners and losers.[47] Furthermore, allowing the paging carrier to choose which interconnection arrangement best suits its needs will prevent the ILECs from exercising their dominant market position to force paging carriers into interconnection arrangements unfavorable to paging carriers.

The opt-in approach for paging does not require the Commission to decide whether bill-and-keep is the most efficient solution for all LEC-CMRS traffic. Since paging carriers have a number of different business models and networks which have been constructed over the last sixty years, it would be extremely difficult for the Commission to adopt one LEC-paging interconnection model which would meet the needs of all paging carriers. And, the opt-in approach does not force the Commission to face the complex legal issues which surround the interplay between Sections 251-252 and 332(c) of the Act.[48] Accordingly, allowing bill-and-

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[47] For example, if the Commission adopted mandatory bill-and-keep for all CMRS services, paging carriers would have higher costs than other wireless competitors, such as cellular, enhanced SMR and broadband PCS, which would disadvantage paging carriers and would inevitably lead to customers switching to the now lower cost CMRS services.

[48] For example, in the *Local Competition Order*, the Commission found that Sections 251, 252, 332 and 201 are "designed to achieve the common goal of establishing interconnection and ensuring interconnection on terms and condition that are just." *Id.* at ¶1023. The Commission, however, declined to determine the precise extent of its jurisdiction under Section 332. *Id.*

keep as an option for LEC-paging interconnection gives paging carriers the widest possible latitude to design their interconnection arrangements in the most efficient way possible with minimal regulatory impact and blunts the ability of interconnecting ILECs to exercise their dominant market power to force inefficient interconnection arrangements.

III. THE COMMISSION, RATHER THAN ADOPTING MANDATORY BILL-AND-KEEP FOR PAGING, SHOULD AFFIRM AND IMPROVE THE EXISTING INTERCONNECTION RULES

The existing interconnection rules have proved essential to paging carriers in negotiating new interconnection arrangements with the LECs and have allowed paging carriers for the most part to design efficient interconnection arrangements. Nevertheless, the LECs have continued to resist certain efficient interconnection arrangements by seizing upon perceived ambiguities in the existing rules. Accordingly, even if the Commission adopts PCIA's opt-in approach for bill-and-keep for LEC-paging interconnection, the existing interconnection rules should be affirmed in some respects and modified in some respects to remove certain ambiguities and realize the pro-competitive promise of the 1996 Act.

A. The Commission Should Require That Costs for Dedicated Transport be Based on an ILEC's Forward-looking Economic Costs

The *Local Competition Order* and the Commission's Rules promulgated thereunder provide that the additional costs for transport of telecommunications shall be at a carrier's forward-looking costs.[49] However, many ILECs have resisted providing transport to paging carriers at the ILEC's forward-looking costs. Instead, most of the current LEC-paging

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interconnection agreements require transport be paid at the equivalent of access tariff rates. These rates include universal service and other subsidies, and do not meet the requirement for cost based rates.

The Commission drew certain distinctions between interconnection and transport in the *Local Competition Order*,[50] and many LECs have seized upon the distinctions to argue that transport used solely for interconnection does not need to be provided at the ILEC's forward-looking costs. In addition, many ILECs take the position that, since transport for transit traffic is only for a portion of an ILEC facility, the most appropriate rates for that portion of the facility should be the ILEC's tariffed access rates and not the ILEC's forward-looking costs of providing such transport. This is clearly wrong under the Act. Section 252(d)(2) requires that transport be priced at a carrier's forward-looking costs (e.g. TELRIC). And, the plain language of Sections 252(d)(1) and 252(d)(2) indicates that the same standards should be used <u>both</u> for unbundled network elements <u>and</u> transport costs – *e.g.* forward-looking costs.[51] And, the Commission expressly found in Paragraph 1054 of the *Local Competition Order* that the same methodologies should be used to establish rates under both sections, holding that the "transport of traffic should be priced based on the same cost-based standard, whether it is transport using unbundled network elements or transport of traffic that originated on a competing carrier's network."[52] Accordingly, the use of the same forward-looking cost standard for UNE pricing, interconnection facilities pricing and termination compensation is consistent with the statute.

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[49] Local Competition Order at ¶¶ 1054, 1111-1118.

[50] *See Local Competition Order* at ¶¶1039-1040.

[51] *Cf.* Section 252(d)(1) provides rates for interconnection of facilities and equipment for interconnection and network elements shall be based on "the cost … of providing the interconnection or network element … ." and Section 252(d)(2) provides that the costs for transport and termination shall be based on "a reasonable approximation of the additional costs of terminating such calls."

In addition, using such a forward-looking cost standard also ensures against unreasonably high barriers to competition. To the extent that LECs are able to price transport associated with interconnection at rates above their forward-looking costs, competing carriers are required to incur higher costs to deliver calls to the ILEC than the ILEC itself incurs to deliver the same call. This provides the ILEC with a competitive advantage that effectively deters competitive entry.

This is not a moot issue with respect to LEC-paging interconnection. In many instances, LECs are forcing paging carriers to pay a substantial amount of the costs of dedicated facilities used by the LECs to deliver LEC-originated traffic to them notwithstanding Section 51.703 of the Commission's Rules and the *TSR Order*. If paging carriers are required to pay a portion of these facility costs, at the very least, the charges should be based on the ILEC's forward-looking costs; not the LEC's access tariff rates. In addition, competition has had little effect on the rates for these transport elements in the context of LEC-paging interconnection. First, although competing carriers in some instances do offer transport at lower prices than the ILEC, their prices nonetheless are generally higher than the ILECs own forward-looking costs to provide the facility.[53] Second, many ILECs require paging carriers to pay a portion of the transport facilities used for transit traffic and refuse to pay the paging carrier anything for the transport of the ILEC's own traffic if the paging carrier procures the facility from a competing carrier. Accordingly, competition has had little effect on the transport prices charged by ILEC to paging carriers. Therefore, the Commission must re-affirm that CMRS carriers are entitled to use the

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[52] *Local Competition Order* at ¶ 1054.

[53] This makes sense because the price charged by the competing LEC generally are based on higher costs (e.g., less economies of scale) and in many instances are merely resold facilities from the ILEC which generally are based on the retail prices of the ILEC, not its forward-looking costs.

ILEC's transport facilities for interconnection purposes at forward-looking costs, not access tariff rates. Further, the Commission should continue to regulate these rates to the extent that the local market for transport is not fully competitive.

B. The Commission Also Should Reaffirm That Transit Services Provided by Carriers Are the Responsibility of the Originating Carrier

The current rules provide that it is the responsibility of the originating carrier to pay all additional costs associated with the transport and termination of traffic originating on its network.[54] In addition, the existing rules provide that carriers may interconnect either directly or indirectly.[55] If a carrier interconnects indirectly, it makes sense for the originating carrier to be responsible for paying all costs associated with transiting the network of third party carriers. The originating carrier is the one deciding how it wants to interconnect with and deliver its traffic to the terminating carrier and therefore it should pay all costs associated with the form of interconnection it has undertaken.

Most if not all ILECs, however, still require paging carriers to pay for the portion of the ILEC facilities used by the originating carrier. Further, the ILECs have seized upon footnote 70 in the *TSR Order,* which states that paging carriers "are required to pay for 'transiting traffic'", to argue that paging carriers are required to pay for transit traffic even though other CMRS carriers are generally not required to pay for transit traffic originating on the network of other carriers <u>and</u> the ILECs are fully recovering all their costs from the originating carrier. Since it is the ILEC and the originating carrier that have agreed to use the ILEC facilities for transit, the originating carrier should pay the ILEC for all the costs of transiting its traffic to the terminating

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[54] § 51.703(a). *See also Notice* at ¶¶ 8-9.

[55] § 51.700(a)(1) and 251(a)(1).

carrier, including the costs associated with the facilities used by the ILEC to transport the traffic to the paging network.

Not only does this view comport with the structure of the Commission's existing interconnection rules, it also makes sense economically. In many instances the ILEC already fully recovers its costs for the portion of its facilities used to deliver transit traffic to the paging carrier. For example, Qwest charges an originating carrier a fee for transiting traffic, which includes recovery both for the switching, and the transport involved in transiting its network. In the Type 2 Wireless Interconnection Agreement between Qwest Corporation ("Qwest") and Cricket Communications, Inc.,[56] Qwest charges $0.0020070 per minute to provide tandem switching.[57] Qwest, on the other hand, charges for transit traffic $0.0029240 per minute, or approximately $0.0009 per minute of use more than the rate for the tandem switching involved.[58] Accordingly, since the transit traffic rate is in excess of the tandem switching rate, Qwest is recovering the additional costs associated with transit traffic (*e.g.* transport) from the originating carrier.[59] Indeed, based on the rate charged by Qwest for common transport in the Cricket

[56] Type 2 Wireless Interconnection Agreement between Qwest Corporation f/k/a U S WEST Communications, Inc. and CRICKET Communications, Inc. for the State of Colorado, Agreement Number CDS-000821-0057; *Approved by the Colorado Public Utilities Commission* in Decision Granting Application for Approval of Interconnection Agreement, *Application for Approval of Interconnection Agreement between Qwest Corporation and Cricket Communications, Inc.*, Decision No. C00-1382 (Mailed Dec. 8, 2000)("Cricket Agreement").

[57] Qwest charges this rate for the tandem switching. This rate does not include transport, which is charged at the rate of $0.00003590 per minute of use plus a rate of $0.0000080 per mile per minute of use.

[58] Indeed, in some contracts, Qwest is explicit that the originating carrier is responsible for both tandem switching and transport. For example, in Section 4.8.8.of the Sprint Spectrum interconnection agreement, Sprint is responsible for "for tandem switching and tandem transport". Wireless Interconnection Agreement between U S WEST Communications, Inc. and Sprint Spectrum L.P., as agent and general partner of Wireless Co. L.P. Colorado.

[59] These rate differentials are not an isolated event. PCIA examined several other interconnection agreements that Qwest has with other carriers and found a similar rate differential. For example, in the Type 2 Wireless Interconnection Agreement between U S WEST Communications, Inc. and NexTel West Corporation, Colorado, DEN-970818-4402, Qwest charges $0.004624 for transit traffic and $0.003707 for tandem switching. In addition, in the Type 2 Wireless Interconnection Agreement between Qwest Corporation f/k/a U S WEST Communications, Inc. and San Isabel Telecom, Inc. for the State of Colorado, Agreement Number CDS-000918-0039, Qwest charges $0.0029240 for transit traffic and $0.0020070 for tandem switching.

Agreement, Qwest is on average being compensated for transporting the call over 100 miles. These are the same costs that LECs, such as Qwest, try to impose on paging carriers in the form of payments for the portion of the facility used to deliver transit traffic. Clearly the ILEC should not be allowed to recover twice for the same services. Since it is the originating carrier which contracts with the LEC to provide the transiting services, the Commission should conclude that the LECs should not recover these amounts from paging carriers.

C. The Commission Should Retain the Existing Presumptive ILEC Cost Model For Terminating Compensation and Should Abandon its Requirement That Paging Carriers Demonstrate Their Costs for Terminating Compensation

In the *Local Competition Order* the Commission determined that the ILEC's forward-looking costs to terminate telecommunications on its network is a reasonable proxy for the costs incurred by broadband CMRS carriers to terminate calls on their networks.[60] Accordingly, the Commission allowed broadband CMRS providers to charge the same rates (*e.g.*, symmetrical rates) for calls terminating on their network that are charged by the ILEC for calls terminated on its network. The Commission should continue the existing symmetrical rate presumption for LEC-CMRS interconnection. In the five years since the adoption of the *Local Competition Order* the symmetrical rate presumption has fostered prompt agreements between two-way CMRS carriers and ILECs with minimal regulatory intervention. Further, the costs to provide CMRS services have not declined since the adoption of the *Local Competition Order*, if anything they have increased with the need to migrate to digital networks and increase network capacity. Accordingly, the findings in the *Local Competition Order* that broadband CMRS carriers incur at least the same forward-looking costs to terminate calls as the ILEC are still valid today. This rate is a proxy and may in fact not lead to recovery of all of a broadband CMRS provider's forward-looking costs, but CMRS carriers are entitled to recover all usage sensitive costs associated with terminating a call, which may in fact be in excess of those the ILECs, by proving their costs.[61] To the extent that the symmetrical rate presumption leads to compensation which is substantially lower than the actual costs, no regulatory arbitrage opportunities exist. Accordingly, the Commission should continue the existing presumptive ILEC cost model for LEC-CMRS interconnection. In addition, PCIA submits that the Commission should expand the presumptive ILEC cost model to include LEC-paging interconnection.

When the Commission endorsed the symmetrical rate presumption for LEC-CMRS interconnection, the Commission, adopted a completely different rule for LEC-paging interconnection. In the *Local Competition Order* the Commission determined that it did not have sufficient information to determine whether a paging carrier's costs were similar to the ILECs costs. The Commission therefore concluded that the ILEC's "forward-looking costs of termination may not be reasonable proxies for the costs of paging providers."[62] Accordingly, the Commission did not adopt the symmetrical rate presumption used for the rest of the CMRS industry, but rather required paging carriers to prove their forward-looking costs. This requirement is quite burdensome. Paging carriers must incur substantial transaction costs to prove their forward-looking costs. Subjecting paging carriers to this disparate treatment is no longer justified.

Since the release of the *Local Competition Order*, there have been a sufficient number of cost studies performed by paging carriers, and voluntary agreements reached between ILECs and

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[60] *Local Competition Order* at ¶¶ 1085-1089.

[61] *Notice* at ¶ 104.

[62] *Local Competition Order* at ¶ 1092.

paging carriers, that the Commission can now conclude that the costs of paging carriers are no different than ILECs or other CMRS carriers. In two instances where state commissions have examined the issue of the forward-looking costs of paging carriers, they have set terminating compensation rates at the ILEC rate, even though the paging carriers proved that their costs were substantially higher.[63] In addition, many of the ILECs have contractually agreed to terminating compensation rates for paging carriers which are the same as other LEC or CMRS rates. For example, Qwest has entered into LEC-paging agreements that pay terminating compensation at Qwest's forward-looking costs for termination on its network.[64] Accordingly, there can no longer be any reasonable doubt that paging carriers incur at least the same forward-looking costs as ILECs to terminate calls. The presumptive ILEC costs should be used as the baseline for paging compensation rates. Further, since paging carriers offer services competitive with other CMRS services, they are entitled to be paid at least the same rate as other CMRS carriers; any lower rate would be discriminatory and not technology neutral. Therefore, the Commission should mandate the paging carriers be allowed to adopt, at its option, either the symmetrical rate charged by the ILEC to terminate calls originated by other carriers on its network or the same rate paid to other CMRS carriers. This rule change would reduce litigation and expedite the entry of voluntary agreements.

In addition, the ILEC cost-based termination rate should be viewed as a proxy but not preclude a higher rate if proved. As the Commission recently observed in the *Notice*, a CMRS

[63] *See* ***Cook Arbitration*** and *Washington Arbitrator's Report and Decision,* adopted by the Washington Utilities and Transportation Commission in WUTC Order on July 1, 1999 in Docket UT-990300. In both instances, the Commission did not take into account the forward-looking costs of all of the traffic sensitive elements of the paging network. In each instance, the Commission cut off consideration of cost at the paging switch.

[64] Qwest is not the only ILEC to have entered into such agreements. Southwestern Bell and Southern New England Telephone have entered into similar agreement albeit with blended end office rates. In addition, BellSouth has entered into LEC-paging agreements that pays terminating compensation at the CMRS rate for two-way traffic.

carrier should be entitled to recover its costs to terminate a call in excess of this proxy rate if the CMRS carrier can demonstrate that its additional costs to transport and terminate are in fact higher than the ILEC's rate.[65] Accordingly, just like other CMRS carriers, to the extent that a paging carrier proves that its forward-looking costs to terminate calls on its network are more than the symmetrical rate, the paging carrier should be entitled to recover those higher costs.

D. The Commission Should Retain Its Existing Geographic Area Only Test For Tandem Treatment And Not Include A Functional Equivalency Test

In the *Notice*, the Commission observes that Section 51.711(a)(3) of the Commission's Rules provides that a carrier is only required to show that its switching facility serves an area comparable to an ILEC tandem before it is entitled to the presumptive ILEC costs for tandem switching.[66] The Commission points out, however, that there has been some confusion in the state proceedings stemming from additional language in the text of the *Local Competition Order* regarding functional equivalency.[67] The *Notice* clarifies that the current test is only a geographic area test, but seeks comment on whether the "functional equivalency" language of paragraph 1090 of the *Local Competition Order* should be added to the Commission's Rules.[68]

PCIA concurs that the "functional equivalency" language has led to significant confusion. ILECs repeatedly have seized upon this language to argue that paging carriers are not entitled to be paid terminating compensation at the tandem rate even though the geographic area served by the paging switch is comparable to the ILEC tandem switch. Certain ILECs have claimed, and in some instances have gotten state commissions to agree (mistakenly), that paging

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[65] *Notice* at ¶ 104.

[66] *Notice* at ¶ 105.

[67] *Id.*

[68] *Id.*

switches are not "functionally equivalent" to ILEC tandem switches. Thus, it is important for the Commission to put this issue to rest.

The Commission, should reject any modification to the current rule because the geographic area only test best captures the hierarchy of switches in the public switched telephone network and provides a bright line test which is easy to apply regardless of the technology deployed by the carriers. In contrast, a functional test requires the decision maker to engage in arbitrary line drawing between different switches and network architectures. The Commission was wise to adopt the geographic area only test because networks are evolving away from historical hierarchical network architecture and historical switching models. Any functional equivalency test will get even more difficult to apply as time goes on and networks further evolve away from historical switching models. And, a functional equivalency test would require the Commission to continue to fit new technologies into historical models of switching which will be impossible to do. Finally, a bright-line test, such as a geographic only test, eliminates and/or diminishes the need for regulatory intervention at the current time and as technology evolves.

E. The Commission Should Retain The Existing Single POI In The LATA Rule And Should Not Adopt Any Requirement That Carriers Either Establish POIs In Each Local Calling Area Or Allow LECs To Imposes Access Charges on CMRS Carriers to Deliver Calls Outside the LEC's Local Calling Area

In the *Notice*, the Commission observes that ILECs must allow telecommunications carriers to request interconnection at "any technically feasible point, including the option to interconnect at a single POI [point of interconnection] in the LATA."[69] The *Notice* further asks whether ILECs are entitled to be paid "access" (or, presumably, surcharge their own customers)

[69] *Notice* at ¶ 112.

for calls delivered to interconnecting carriers outside the local calling area of the ILEC. The Commission should stay the course and not adopt any changes to the interconnection rules which require now ILECs to deliver traffic to a single POI and prohibit access-type charges.

In the *Local Competition Order*, the Commission determined that telecommunications traffic that originates and terminates within the same major trading area ("MTA") is considered local.[70] Accordingly, the *Local Competition Order* allows CMRS carriers to request interconnection at any technical point in the MTA (as well as in the LATA) and precludes the ILEC from assessing access charges on CMRS carriers so long as the call originates and terminates within the same MTA.[71] This rule makes sense and the Commission should not modify it.

The MTA is a natural geographic service area for many paging systems. The Commission has recognized this fact by using the MTA in establishing market area territories for paging and narrowband PCS licensing areas. Paging carriers not only have been licensed on an MTA-wide basis, they also have constructed their networks and interconnected on a MTA-wide basis. Any abandonment of existing MTA rule would be extremely disruptive to existing paging network hierarchies and LEC-paging interconnection arrangements. As earlier noted, paging carriers have only recently been able to secure broadscale interconnection agreements that comport with the Act's requirements. Any change now would cause paging carriers to have to renegotiate and re-engineer their networks. As the Commission knows, the paging industry is at a delicate point right now as it shifts from traditional paging services to more advanced paging

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[70] *Local Competition Order* at ¶ 1043.

[71] Of course to the extent that ILECs do not have authority pursuant to the Act to provide interLATA transport, they are obligated nonetheless to reimburse terminating carriers for the interLATA transport to the single POI on the CMRS carrier's network in the MTA for traffic originated on the ILEC's network. See also TSR Order at ¶ 31.

services. Paging carriers are having to dedicate significant resources to this shift in services. Any disruption in the interconnection arrangements or diversion of scarce paging carrier resources would have a devastating effect on the paging industry.

PCIA concurs with the Commission's concerns expressed in the *Notice* that requiring CMRS carriers to establish POIs at every local calling area would require CMRS carriers to inefficiently replicate the wireline network.[72] Paging carriers typically serve an entire MTA with one switch. An ILEC may serve the same area with many times more switches. Accordingly, to make paging carriers establish POIs in each local calling area would require paging carriers to create highly inefficient interconnection arrangements either by deploying a significant number of additional switches or establishing POIs and dedicated facility arrangements draped over the ILEC network.[73] Such a requirement would be highly inefficient, and exceedingly expensive given the ILEC practice of charging for dedicated transport at access rates.

In contrast, shared transport costs are relatively low, so requiring ILECs to transport all their traffic to a single POI is minimal. For example, as is discussed below, the shared transport rate for Qwest set forth in its Cricket Agreement is $.000008 per minute of use per mile. This cost is substantially less than the cost of installing, operating, and maintaining a switch in a local calling area. Indeed, the ILECs have reached the same conclusion that the costs are minimal. When ILECs are responsible for providing the dedicated transport between their network and the paging network, they have agreed on single points of interconnection, generally in a LATA, in order to maximize the use of high efficiency trunk groups. Further, leaving the MTA rule in

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[72] *Notice* at ¶ 114.

[73] Deployment of additional switches may be problematic given that the largest manufacturer of paging switches – Glenayre Electronics – has severely curtailed production of paging switches.

place preserves the *status quo* which of late has proved workable for both paging carriers and LECs. Therefore, the Commission should continue the existing single POI in an MTA/LATA

In addition, any costs to interconnect in each local calling area should be borne by the originating ILEC and not subject to access charges. Under Sections 251(b)(5) and 252(d)(a) of the Act, terminating carriers are entitled to be paid the additional costs for both the transport from the originating carrier's network to the POI (to the extent not provided on the ILEC's own network) and transport to the MTSO/switch. Any other result would be discriminatory. The current Commission rules apply a common sense rule – if a carrier would be required to reimburse the other carrier, it should provide it at its own expense. ILECs currently charge CMRS carriers for CMRS-originated traffic for the additional costs to transport calls from the ILEC's POI to the terminating central office. In a tandem interconnection arrangement, ILECs also charge for tandem switching and common transport to end-offices. It would be discriminatory to disallow CMRS carriers from recovering this transport cost, but to allow ILECs to continue to charge for it.

Further, ILECs should continue to be precluded from charging CMRS carriers access (or surcharging their own end-user customers) if they deliver their own traffic outside the local calling area to numbers rated within the local calling area. The *Notice* confuses two concepts when it asks whether ILECs should be entitled to assess access charges on interconnecting carriers for delivering calls outside the local calling area.[74] In the public switched network, toll charges are measured based upon the airline miles between the rate centers associated with the end-user telephone numbers, not the actual distance undertaken to deliver the call. For example,

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[74] *Notice* at ¶ 113.

a call which may be rated as local to an adjacent end office may in fact be delivered via a tandem which requires substantially longer transport than merely the airline distance to the adjacent end office. In this instance, the ILEC does not charge its customers the longer transport, but rather the shorter airline miles between rate centers. Further, when a call is delivered to a telephone number rated outside the local calling area of the originating end-user's rate center, the ILEC collects toll regardless of whether it transports the call the entire distance to its destination, or hands the call off to a third party who transports the call itself. It is a simple fact of life in a multicarrier world with redundant networks that calls will often be routed over longer (or shorter) distances than they are rated. To allow ILECs to surcharge their own customers, or surcharge CMRS carriers access, when they dial another carrier's locally rated numbers would be extremely discriminatory since the ILECs themselves do not impose such costs on their own customers when terminating calls on their own networks. The Commission should not overlook the real concern that surcharges can be used to exercise monopoly power by raising the costs of calls to CMRS and CLEC end-users that subscribe to a competing carrier's services.

To implement an access charge or surcharge structure also would not be efficient. In many instances, telecommunications carriers have moved beyond the historical requirement that the rating center established with a number be the same as the routing point for calls delivered to the end user customers. Indeed, in many instances, CMRS carriers, including paging carriers, are serving entire LATAs or MTAs, which are comprised of numerous rate centers, with single switches via single points of interconnection. When traffic is destined for a particular end user telephone number, the traffic may or may not actually be transported by the originating carrier over the entire distance assumed by the rating centers associated with the originating and terminating end users. In many instances, the terminating carrier may in fact assume most of the transport obligation, depending on the location of the point of interconnection. To force interconnecting carriers to either replicate the inefficient historical networks that the ILECs currently use (without the corresponding economies of scale that the ILECs enjoy), or to force carriers to pay a larger portion of facilities costs incurred in transporting ILEC traffic, would permit the ILECs to use their dominant market power to force inefficient interconnection arrangements. Accordingly, the best approach is for the Commission to stay the course and not change its existing rules regarding a single POI in the LATA/MTA and precluding access charges (and surcharges on the ILECs own customers) to deliver calls originating and terminating with the LATA/MTA outside the local calling area of the ILEC.

F. The Commission Should Reaffirm That CMRS Carriers Are Entitled to Assess Access Charges

In the *Notice*, the Commission seeks comment on whether CMRS carriers are entitled to receive access charges for interexchange traffic originating and terminating on their networks.[75] CMRS carriers already are entitled to assess access charges for the exchange access services they provide and the Commission should reaffirm such entitlement. In the *Second Report and Order* implementing the Omnibus Budget Reconciliation Act of 1993, the Commission decided to "temporarily forbear from requiring or permitting CMRS providers to file tariffs for interstate access service."[76] If CMRS carriers were not already permitted to assess access charges, the Commission would not have needed to forbear from requiring or permitting access tariffs. Indeed, many CMRS carriers at the time had filed interstate tariffs with the Commission which were canceled as a result of the *Second Report and Order*. And, the Commission tentatively

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[75] *Notice* at ¶ 94.

[76] *Second Report and Order*, In the Matter of Implementation of Sections 3(N) and 332 of the Communications Act Regulatory Treatment of Mobile Services, 9 F.C.C. Rcd. 1411, ¶ 178 (March 7, 1994).

concluded in a *Notice of Proposed Rulemaking* issued in 1995 that "CMRS providers should be entitled to recover access charges from IXCs, as the LECs do when interstate interexchange traffic passes from CMRS customers to IXCs (or vice versa) via LEC networks."[77] Further, the Commission concluded that "less favorable treatment of CMRS providers would be unreasonably discriminatory, and would interfere with our statutory objective and ongoing commitment to foster the development of new wireless services such as CMRS."[78]

Notably, the Commission has concluded that CMRS carriers provide telephone exchange services.[79] By extension, the fact that CMRS providers provide telephone exchange service means they also provide exchange access because CMRS providers are providing "access" to their telephone exchange services.[80] In the *Local Competition Order*, the FCC found that carriers providing exchange access were entitled to assess access charges. [81] In light of the Commission's earlier pronouncement that it would be discriminatory for CMRS carriers to not assess access charges and the fact that CMRS carriers provide exchange access, it would be fair to conclude that CMRS carriers are entitled to assess access charges. Indeed, some CMRS carriers are already assessing access charges for originating and terminating access.

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[77] *Notice of Proposed Rulemaking*, In the Matter of Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers, 11 F.C.C. Rcd, 5020 (Docket 95-185)(Adopted December 15, 1995)("*CMRS NPRM*") at ¶ 116.

[78] *CMRS NRPM* at ¶ 116.

[79] *Local Competition Order* at ¶ 1013. The Commission concluded that at a minimum cellular, broadband PCS, and covered SMR providers provide telephone exchange service. The Commission concluded in the *Second Report and Order*, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, FCC 96-333 (Released August 8, 1996) that paging providers did not provide telephone exchange services, but such determination is still pending on reconsideration.

[80] *See* Section 3(16).

[81] *Local Competition Order* at ¶ 191.

However, some interexchange carriers have challenged whether CMRS carriers are entitled to assess access charges and the Commission should affirm in this docket that CMRS carriers are entitled to assess access charges. In addition, notwithstanding any adoption of bill-and-keep for LEC-CMRS interconnection, the Commission should allow CMRS carriers to assess access charges for at least 4 years because the Commission has assured CLECs that they would be able to assess access charges for a minimum of 4 years.[82] CMRS services are becoming increasing competitive with wireline services and therefore the statement that the Commission made in 1995 still rings true today – it would be discriminatory to prevent CMRS carriers from assessing access charges if LECs can assess access charges.

In addition, CMRS carriers should be entitled to file access tariffs with the FCC just like CLEC and ILECs. In the *CLEC Access Order,* the Commission recognized the benefits tariffs afforded carriers in minimizing transaction costs.[83] PCIA agrees. If the Commission does not permit CMRS carriers to file access tariffs while allowing other competitors to do so, the Commission would be discriminating against CMRS carriers. Accordingly, the Commission should adopt same scheme for CMRS carriers as set forth in *CLEC Access Order* which would allow CMRS carriers to file access tariffs at the federal level.

IV. THE COMMISSION SHOULD ESTABLISH UNIFORM LEC-CMRS INTERCONNECTION RULES AND AN OPTIONAL FEDERAL FORUM

The Commission should establish a federal nationwide interconnection regime for LEC-CMRS interconnection pursuant to Sections 201 and 332 of the Act and consistent with the substantive protections accorded all telecommunications carriers under Section 251 and 252 of

[82] *CLEC Access Order* at ¶ 53; See also *Notice* at ¶ 97.

[83] *CLEC Access Order* at ¶ 42.

the Act. The history and language of Section 332 of the Act support such a nationwide regime. In adopting Section 332, Congress made clear that its goal was to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure".[84] Congress believed that such a regime would naturally be federal in nature and Congress accordingly precluded states from regulating the entry or rates of CMRS carriers. Congress also adopted Section 332(c)(1)(B) which provides that "upon reasonable request of any… [CMRS provider] the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of Section 201 of this Act."

In implementing Section 332, the Commission recognized that this statutory section gave the Commission authority to implement interconnection rules governing ILEC-CMRS interconnection and indeed adopted Section 20.11 of the Commission's Rules which codified ILEC-CMRS interconnection. For example, Section 20.11 provides that "a local exchange carrier must provide the type of interconnection reasonably requested by a mobile service licensee or carrier" and "a local exchange carrier shall pay reasonable compensation to a commercial mobile radio service provider in connection with terminating traffic that originates on facilities of the local exchange carrier." Indeed, the Commission recently released an *Order* in *AirTouch Cellular v. Pacific Bell* which held that LECs were required under Section 20.11 to pay reciprocal compensation on all calls originating on a LEC's network to CMRS carriers, not just interstate calls.[85]

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[84] H.R. Report No. 103-11, 103rd Cong., 1st Sess. 260 (1993).

[85] *AirTouch Cellular v. Pacific Bell*, FCC 01-194 (Released July 6, 2001) at ¶¶ 7-14.

In the *Local Competition Order*, the Commission recognized that 332(c)(1)(B) provides it with authority over LEC-CMRS interconnection, but the Commission decided to proceed under Section 251 and 252 because it was the Commission's view at that time that Section 251 and 252 would expedite negotiations, "drive voluntary agreements", and "facilitate consistent resolution of interconnection issues".[86] The Court of Appeals agreed that the Commission's authority with respect to CMRS is broader than its authority under 251/252 and that the Commission had the authority to adopt rules of "special concern" for CMRS carriers.[87] The Commission also stated that if the regulatory scheme adopted under Section 251 and 252 did not sufficiently address the problems that CMRS carriers faced in obtaining interconnection, "the Commission may revisit its determination to not invoke jurisdiction under section 332."[88] The Commission should (1) revisit this determination and adopt a nationwide uniform scheme for all LEC-CMRS interconnection; and (2) give CMRS carriers the option of choosing a federal forum to resolve interconnection agreement and interconnection rights issues.

A national uniform regime makes sense. CMRS carriers operate over multiple states making national rules more appropriate. States have chosen to implement the Commission's existing rules under Sections 251 and 252 in a multiplicity of ways. In some instances, state commissions have implemented the Commission's Rules in ways that deprive CMRS carriers of economies of scale and scope and require adoption of inefficient network designs based on historical LEC network designs. In addition, CMRS carriers are forced to negotiate and arbitrate with the same LEC in some instances in each state over the same issue. In some instances,

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[86] *Local Competition Order* at ¶¶ 1022-1026.

[87] *Iowa Utils Bd.* at fn. 21.

[88] *Local Competition Order* at ¶1025.

ILECs have threatened to require arbitration of the same issue in each state and for each carrier in a state even though the ILEC's position clearly is at odds with the Commission's Rules and the ILEC already has lost in the some early state arbitrations. This is clearly the kind of inconsistent result that the Commission should avoid.

Further, CMRS carriers are at a distinct disadvantage in state proceedings. CMRS carriers generally do not have a "constituency" at the state commission or even regulatory resources in each state because state commissions do not heavily regulate CMRS. On the other hand, ILECs have long-term relationships with regulators and local counsel that cannot be replicated. These advantages enjoyed by the ILECs have lead ILECs to force state arbitrations which have lead to inconsistent results.

Finally, a federal forum would lead to reduced transaction costs and less need for regulatory intervention. Since CMRS systems often are multistate, the same issue may arise in multiple states requiring multiple arbitrations and the consumption of scarce state regulatory resources to implement. A federal forum would undoubtedly lead to more voluntary agreements with less negotiation because CMRS carriers would negotiate agreements on a national or region-wide basis. Since paging carriers operate in a highly competitive market they cannot afford the duplicative regulatory resources and high transaction costs associated with the existing system. In addition, a federal forum would preserve scarce regulatory resources by eliminating the need for multiple state arbitrations and for arbitrations on a region-wide or national basis.

PCIA is not asking the Commission to preempt totally the jurisdiction of state commissions over CMRS interconnection agreements – though certainly the FCC has the power to do so. Rather, PCIA suggests that a CMRS carrier requesting interconnection be given the choice of going to the expert federal agency or to the state commission for relief. Allowing this choice is consistent with the statutory interconnection scheme which has been construed in many respects to empower the carrier requesting interconnection and thereby overcome the market power of the ILECs.[89]

To implement such a federal scheme the Commission does not need to craft rules out of whole cloth. Rather, the Commission should use as a matter of original jurisdiction the existing arbitration rules and procedures it adopted for use in the event that a state commission failed to meet the applicable arbitration deadlines. *See* 47 C.F.R. Section 51, Subpart I. In this manner the Commission can replicate the current Section 251/252 process, with its emphasis on voluntary negotiation, but in a more efficient fashion.

Furthermore, any disputes between ILECs and CMRS carriers should be resolved through the Section 208 Complaint process. CMRS carriers have effectively used the Section 208 complaint process to enforce existing interconnection rules and this process should continue under any federal regime.[90] The Section 208 Complaint process, which sets forth specific time frames, has allowed LEC-CMRS disputes to be resolved in a timely fashion and has led to numerous settlements in the face of a decision by the Commission. And, Section 208 complaints hold the promise of resolving in a manner that will be applicable over an entire ILEC area. Thus, the amount of regulatory intervention will be reduced. Accordingly, the Commission

[89] For example, the Commission has interpreted Sections 251/252 of the Act to allow an interconnecting carrier to choose to retain an existing interconnection agreement, or to renegotiate it, and to choose whether to negotiate its own agreement or to step into the shoes of another carrier by invoking rights under Section 252 (i) of the Act. The Commission also allows CMRS carriers to choose whether to exercise their rights under the "Mirroring Rule" to adopted the capped CLEC rates made available in the *ISP Remand Order*. Allowing a CMRS carrier to choose a forum (federal or state) is entirely consistent with these prior rules.

[90] In the *TSR Order* the Commission explicitly found that it already has the authority pursuant to Section 208 to decide interconnection disputes between CMRS carriers and ILECs. *TSR Order* at ¶ 13.

should adopt a federal nationwide interconnection regime for LEC-CMRS interconnection pursuant to Sections 201 and 332 of the Act and consistent with the substantive protections accorded all telecommunications carriers under Section 251 and 252 of the Act.

V. CONCLUSION

WHEREFORE, the foregoing having been duly considered, PCIA respectfully submits that the Commission should not adopt mandatory bill-and-keep for paging-LEC interconnection, but rather should implement bill-and-keep, if at all, as another option for interconnection for paging-LEC interconnection. Further, PCIA respectfully requests that the Commission adopt the clarification and improvements to the existing intercarrier compensation scheme recommended by PCIA. Finally, PCIA urges the Commission to establish uniform federal nationwide intercarrier compensation regime for LEC-CMRS interconnection pursuant to Sections 332 and 201 of the Act, and consistent with the substantive protections given by Sections 251 and 252 of the Act.

Respectfully submitted,

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